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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DEE LAMBERTON,)	
)	
Appellant,)	PCHB No. 89-95
)	
v.)	
)	FINAL FINDINGS OF FACT,
STATE OF WASHINGTON,)	CONCLUSIONS OF LAW
DEPARTMENT OF ECOLOGY,)	AND ORDER
)	
Respondent.)	

This matter, the appeal of the denial of an application to appropriate groundwater from the Starzman Lake Drainage in Okanogan County, came on for hearing on April 16, 1990, in Wenatchee, Washington, before the Pollution Control Hearings Board; Wick Dufford, presiding. Judith A. Bendor, chair, and Harold S. Zimmerman, member, have reviewed the record.

Dee Lamberton represented himself. Jay Manning, Assistant Attorney General, represented the Department of Ecology. Douglas D. Dietrich of Affiliated Court Reporters, reported the proceedings.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. From the testimony heard and exhibits examined, the Board
3 makes the following

4 FINDINGS OF FACT

5 I

6 The Starzman Lake Drainage (or Starzman Basin) occupies
7 approximately 16.5 square miles of semi-arid range land in Okanogan
8 County. The basin runs north and south with its southerly limit about
9 three miles due north of Brewster, Washington. Two ridges, each about
10 eight miles long, separate the Starzman drainage from adjacent
11 watersheds to the east and west. The northmost portion of the basin
12 is enclosed by Rowel Peak and Dent Mountain. The basin opens to the
13 south onto the Brewster Flat. The basin floor slopes to the south
14 from an elevation of about 1700 feet to an elevation of about 1200
15 feet.

16 II

17 The ridges which form the lateral boundaries of the Starzman
18 Basin average an elevation of 2,200 feet and are made of granite. The
19 basin is likewise underlain with granite. Inside this granite bowl on
20 the valley floor are deposits of glacial till and fine-grained soil of
21 varying thicknesses. The depth to bedrock through the unconsolidated
22 material varies from a few feet to 250 feet below land surface. The
23 deepest layer of till, overlain by up to four feet of soil, is at the
24 southern end of the basin.

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26 FINAL FINDINGS OF FACT

27 CONCLUSIONS OF LAW & ORDER

PCHB No. 89-95

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III

There are no perennial surface water streams in the basin. Water is found primarily in a water table aquifer contained within the overburden of till and soil above the bedrock. Small lakes and ponds scattered through the drainage are surface expressions of the water table. The groundwater of the basin drains southward into the Brewster Flat.

IV

On February 22, 1985, Dee and Sandra Lamberton applied (Application No. G4-28621) to the Department of Ecology for a permit to appropriate groundwater for domestic supply, stockwatering and the irrigation of 60 acres in Section 1, Township 31 North, Range 24 East, Willamette Meridian--near the upper end of the Starzman Basin.

On the same day, the Lambertons also filed a surface water application (Application No. S4-28622) for stockwatering and irrigation of the same 60 acres. The surface water application (intended as a backup to the groundwater request) asked for water from a spring, a lake and a stream, all unnamed, in the vicinity of the place of use.

V

In the year prior to the filing of the Lamberton applications, Ecology's field inspectors, having noted fluctuations in the water levels in the Starzman Basin, became concerned that the area might be either over-appropriated or approaching this condition.

This led to the initiation of a study of the situation. Pending its completion, applications for water were held in abeyance. As of June 1985, seven applications for permits to divert or withdraw water from the drainage had been received.

VI

In March of 1987, Ecology produced a study entitled "Evaluation of the Water Resources within Starzman Lake Watershed." The study was the product of both field work and review of agency records and represented the joint efforts of hydrogeologists from the agency's technical staff and the field inspectors working in the permit process.

Relevant findings of the study were that:

a) Recharge of the water table aquifer within the basin appears to be derived exclusively from precipitation which falls within the watershed boundaries.

b) Average annual precipitation falling on the drainage is approximately 11.7 inches.

c) Of the 11.7 inches of precipitation, only an estimated 1.2 inches per year contributes to recharge.

d) The estimate of present potential demands on the resource by users is within three percent of the calculated annual recharge, a figure within the margin of error of the calculated recharge.

VII

Based on these findings, the study concluded that no additional

1 water was available for allocation within the basin. The underlying
2 assumption was that allocations beyond the annual recharge figure
3 would result in groundwater mining and eventually cause the basin to
4 go dry.

5 VIII

6 The study did, however, note the existence of storage in the
7 aquifer, the study estimating a storage capacity of around 12 times
8 the average annual recharge or approximately 13,000 acre feet.

9 IX

10 When the study was issued, a copy was mailed to the Lambertons,
11 with an explanatory letter. The letter advised:

12 The results of the study indicate that the drainage
13 has been fully allocated. This is based on the
14 criteria that no more than 100 percent of the average
annual recharge is available for allocation.

15 X

16 After the study was issued, Ecology waited two years before
17 acting on any of the pending applications. The additional wait was to
18 see if any allocations in the permit stage, and not yet actually
19 appropriated, would fail to develop and be cancelled. After the two
20 years, only 60 additional acre feet became available through this
21 process.

22 XI

23 Ecology ruled on the pending applications in 1989, evaluating
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1 them in the order of their priority. Adopting a slightly more
2 optimistic view than expressed in the study, the agency approved the
3 two oldest applications. However, the rest of the pending requests
4 were denied on the basis that the drainage is already fully
5 appropriated.

6 XII

7 The conclusion of full appropriation rests on a discretionary
8 determination to restrict the volume of water appropriated to a level
9 approximating the average annual recharge. The purpose of this
10 limitation is to prevent the mining of the aquifer.

11 In many drainages, Ecology has limited appropriations to as
12 little as 50% of the average annual recharge. A greater level of
13 appropriation has been allowed here because the storage available
14 provides a reserve seen as adequate to protect existing users in
15 extended drought conditions.

16 XIII

17 The denials of the Lambertons' applications were issued on June
18 30, 1989. Their appeal was filed with this Board on July 28, 1989.
19 The appeal was given our cause number PCHB 89-95.

20 Appellant contends that the water he seeks permission to
21 appropriate is from a source separate from the water withdrawn
22 elsewhere in the basin.
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XIV

The Lambertons own about 113 acres in the basin and believe about 60 of these on the lower part of their property are irrigable. Currently under separate permission--not at issue here-- they are irrigating nine of these acres, planted in alfalfa.

There are three existing wells on this lower part of their property. They produce water which is murky in appearance and laden with grayish sediment.

A fourth well, at a higher elevation on the property, produces clear, clean water which is suitable for domestic use. The Lambertons do not presently reside on the property, but plan to move there in the future.

The water from the fourth well resembles in appearance, taste and smell, the water the Lambertons have observed from the wells of others in the basin.

XV

We are not persuaded that the Lambertons' lower wells are drawing water from a source different from other wells in the Starzman Basin.

The weight of evidence is that the basin contains a single, distinct and isolated aquifer system, separated from out-of-basin water sources by granite barriers. Recharge of the aquifer is, we find, limited solely to precipitation on the overlying land.

The likely explanation for the different appearance of water in the Lambertons' lower wells is that they have penetrated an erosional

1 feature which is contributing decomposed granite to withdrawals from
2 that localized area.

3 XVI

4 Because the gradient in the basin is generally to the south,
5 appropriations from the Lamberton wells near the top of the drainage
6 would eventually affect the availability of water to appropriators
7 lower in the basin. Most of the water use previously established in
8 the basin is at the lower end.

9 Moreover, appropriations from surface water sources on the
10 Lamberton property would have a similar impact. Surface streams are
11 ephemeral. All water in the basin (other than that lost through
12 evapotranspiration) ultimately becomes part of the groundwater system.

13 XVII

14 Any Conclusions of Law which is deemed a Finding of Fact is
15 hereby adopted as such.

16 From these Findings of Fact the Board reaches the following

17 CONCLUSIONS OF LAW

18 I

19 The Board has jurisdiction over the parties and the subject
20 matter. Chapters 43.21B, 90.44 and 90.03 RCW.

21 II

22 Appellants suggest that Ecology should permit them to go ahead
23 and appropriate and, then, turn to regulation if a problem becomes
24 apparent.

1 The information available is, we believe, an adequate basis for
2 assessing the risks for additional groundwater development. Risks
3 appear high that further appropriations would result in groundwater
4 mining to the detriment of prior appropriators. The water code is
5 designed to anticipate and prevent this kind of trouble. Otherwise
6 the application investigation system would have no function. All uses
7 could be allowed to commence and then simply be regulated on the basis
8 of priority. Those who invested in water developments and guessed
9 wrong would just have to suffer the consequences. The statutory
10 permit system is intended to head off such problems before they
11 occur. In large measure, the state water agency's task is prevention,
12 not enforcement. See Black Star Ranch v. Eckerich, PCHB 87-19 (1988).

13 III

14 The circumstances surrounding these applications are closely
15 analogous to those in Jensen v. Department of Ecology, 102 Wn.2d 109,
16 685 P.2d 1068 (1984). There the determination of a permit
17 application was governed in large measure by the outcome of a detailed
18 study of water availability carried out by experts. Their work was
19 based on a reasonable level of data acquisition and research, leading
20 to educated estimates of supply and demand. Such an effort was
21 recognized as an appropriate and adequate means for carrying out
22 Ecology's investigative responsibilities on an individual
23 application. We conclude that Ecology's investigation in this case
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1 satisfied the requirement of RCW 90.03.290 to "investigate all facts
2 relevant and material to the application."

3 IV

4 Ecology's decision here is also governed by the four substantive
5 criteria of RCW 90.03.290: (1) beneficial use, (2) availability of
6 public water, (3) non-impairment of existing rights, and (4) the
7 public interest. Stempel v. Department of Water Resources, 82 Wn.2d
8 109, 508 P.2d 166 (1973).

9 The problem in the instant case is most simply described as one
10 of water availability, although, as often happens, there is an overlap
11 with the existing rights and public interest categories. What is
12 involved is a discretionary decision, legislatively assigned to
13 Ecology's good judgment. See Schuh v. Department of Ecology, 100
14 Wn.2d 180, 667 P.2d 64 (1983); Peterson v. Department of Ecology, 92
15 Wn.2d 306, 596 P.2d 285 (1979).

16 V

17 Fundamentally, the discretionary decision in the case at bar
18 concerns the question of mining water. RCW 90.44.130 requires Ecology
19 to regulate the use of groundwater so that a "safe sustaining yield"
20 is maintained for prior appropriators and "overdraft" is avoided.

21 This does not mean that stored groundwater may never be taken.
22 It means, rather, that the appropriation of waters in excess of annual
23 recharge can be allowed only under circumstances where the ability of
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1 existing rightholders to fully satisfy their rights by reasonable
2 means can be guaranteed. Generally this will require a very large
3 aquifer with a substantial quantity of water in storage, managed
4 through a cautious program of drawdown that does not completely
5 exhaust the resource. See Shinn & Masto v. Department of Ecology,
6 PCHB No. 648, et al (1975). Chapter 173-130A WAC.

7 Under the facts of the instant case, however, we apprehend no
8 reason to substitute a different judgment for the discretionary
9 determination made by Ecology. Here the aquifer is small in area and
10 largely shallow in depth. The aquifer does not contain extensive
11 storage and receives limited precipitation even in the best of years.
12 The decision to limit withdrawals to the average annual recharge is
13 only prudent in the circumstances. Senior appropriators are to be
14 protected even when the average is not reached.

15 VI

16 In short, we hold that Ecology was correct in concluding that
17 water is not available for the proposed use. Starzman Lake Drainage
18 Basin is fully appropriated and existing water resources are needed to
19 satisfy existing rights.

20 VII

21 Appellants might consider the possibilities of purchase of the
22 water rights they seek. They might also give thought to filing
23 another application for the same project in order to establish a
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1 position in line to receive any water which might be forfeited for
2 non-use by others in the future.

3 X

4 Any Finding of Fact which is deemed a Conclusion of Law is hereby
5 adopted as such.

6 From these Conclusions of Law the Board enters the following
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27 FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW & ORDER
PCHB No. 89-95

ORDER

The denial of Application Nos. G4-28621 and S4-28622 are sustained.

DONE this 12th day of June, 1990.

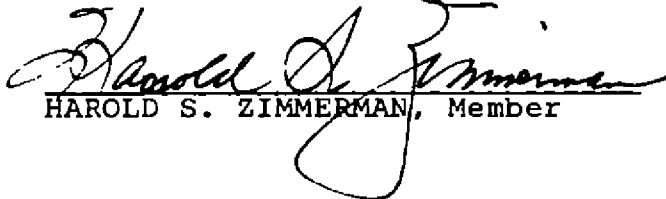
POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Presiding



JUDITH A. BENDOR, Chair



HAROLD S. ZIMMERMAN, Member